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Supreme Court of the United States

———— TERM, 1950

No. 233

IDA E. STEADMAN, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

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IDA E. STEADMAN, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

———

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF

———

To the Honorable Supreme Court of the United States:

The petition of Ida E. Steadman respectfully shows to the Court:

A. Summary statement of matter involved.

This is a petition for a writ of certiorari directed to the Supreme Court of the State of South Carolina to review a judgment of that Court in this case filed on April 12, 1950, Case No. 3167, opinion No. 16339. The judgment

affirmed a conviction of abortion in the General Sessions Court of Richland County.

The case out of which this appeal ultimately arose was begun by the filing of indictments against the petitioner, Ida E. Steadman, charging her with violation of Sections 1112 and 1113 of the 1942 Code of Laws of the State of South Carolina. (R., p. 1, 2.)

Section 1112, upon which the first count was based, provides as follows:

> "Any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or pre-mature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman."

Section 1113, upon which the second count of the indictment was based, reads as follows:

> "Any person who shall administer to any woman with child, or prescribe or procure or provide for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage or abortion or premature labor of any such woman,

shall, upon conviction thereof, be punished by imprisonment in the penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the court, but no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman."

The defendant was tried under both counts of the indictment and found guilty on the first count, that is, for producing an abortion upon the body of Irene Jones on September 16, 1947, and causing the death of the child with which she was found pregnant. The punishment was assessed by the Court at seven years in the penitentiary. Upon appeal being taken to the South Carolina Supreme Court, a decision was rendered November 22, 1948, reversing the judgment of the lower court and remanding the case for a new trial on the second count—charging a violation of Section 1113. The appeal was sustained on the ground that the trial court should have directed a verdict of not guilty on the first count (Section 1112) on which the defendant was convicted, because there was no evidence of a separate and independent existence of a child. In other words, the woman was not quick with child. This decision, *State v. Steadman,* is reported in 214 S. C. 1, 51 S. E. (2d) 91.

The second trial resulted in a conviction on the second count of the indictment. A sentence of five years in the penitentiary was imposed, with a fine of one thousand dollars. From this judgment and sentence, the defendant appealed to the South Carolina Supreme Court again, but this time the judgment was affirmed.

The petitioner, among other grounds, sought a reversal of this second judgment in the court below on the grounds of double or former jeopardy. (R., pp. 42-56, folios 166-223; p. 306, 308, folios 1222-1223, 1229-1231.)

The petitioner was tried for the first time at the January (1948) term of the Court of General Sessions for Richland County on the indictment containing two counts. At the conclusion of the testimony in behalf of the State, the petitioner unsuccessfully moved for a direction of verdict of not guilty generally. (R., p. 259, folios 1034-1046.) Again after all testimony was in, the petitioner unsuccessfully moved for a direction of verdict of not guilty on the first count of the indictment (under Section 1112 of the Code). (R., pp. 288-290, folios 1152-1158.) The jury found a verdict of "Guilty" on the first count. No mention was made in the verdict of the jury as to the second count in the indictment. Indeed, the Trial Judge charged the jury:

> "I say, it is within your province to return a verdict of 'Guilty on first count,' and that will mean, in view of the way I am submitting the matter to you—that will mean not guilty on the second count, or at least you won't be concerned with it. At any rate, first, 'Guilty on the first count,' or, second, 'guilty on the second count,' or, third, 'Not Guilty.' Now, does everybody understand that? I think I made it clear. In other words, I might submit the matter to you in a different form, but under the view I take of it, I am just going to submit it to you that way. In other words, it is within your province, depending upon how you view the testimony, and depending upon what weight you attach to it, to return one of three verdicts, either 'Guilty on the first count,' or, 'guilty on the second count,' or, 'Not Guilty,' which would mean not guilty on either of the counts contained in the indictment." (R, p. 43, folios 166-170.)

The jury found a verdict of guilty on the first count, and from such judgment the appeal came to the State Supreme Court. In the opinion of that Court it was stated that there was a total failure on the part of the State to produce testimony of very necessary elements to sustain a

conviction of the petitioner under Section 1112 of the Code (the first count in the indictment), and held "that the trial judge erred in refusing the petitioner's motion for a direction of verdict of not guilty under the first count; and that the case should have been submitted to the jury on only the second count".

The majority of the court (with two judges dissenting) remanded the case to the circuit court for another trial on the second count. The petitioner contends that this judgment was erroneous on the grounds (1) that the matter was not properly before the court and (2) that she was thereby placed in double jeopardy.

B. Basis of the Court's jurisdiction.

It is competent for this Court to require by certiorari that this case be certified to it for determination pursuant to Act of June 25, 1948, c. 646, 62 Stat. 929; Title 28, Sec. 1254, par. (3) United States Code.

C. Question presented.

Did the Supreme Court of the State of South Carolina err in refusing to reverse the verdict and judgment of the Trial Court and in refusing to enter judgment for the petitioner on the ground that she was placed in double jeopardy by being retried on an indictment on which the petitioner had already been acquitted and thereby denied due process of law?

D. Reasons relied on for the allowance of the writ.

With respect to the question here presented, the Supreme Court of the State of South Carolina rendered a decision in violation of the petitioner's rights under the Constitution of the State of South Carolina and the Constitution of the United States. The State Constitution provides

in Article I, Section 17, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty * * *". The Federal Constitution says in the Fifth Amendment "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *". Thus for all practical purposes the provisions are identical.

Throughout the second trial of the case the petitioner sought—albeit unsuccessfully—to raise the issue of double jeopardy, and repeatedly this plea was overruled by the Trial Judge. The constitutional immunity is a personal privilege which the petitioner has repeatedly and correctly urged in her behalf, and at no stage did the petitioner, expressly or impliedly, waive the plea of former jeopardy. See *Graham v. Squier,* D. C. Wash. 1944, 53 F. Supp. 881, Aff. 145 F. (2d) 348; cert. denied 65 S. Ct. 676, 324 U. S. 834, 89 L. Ed. 1406.

The petitioner, having been found not guilty on the second count by the jury under the instructions of the judge, was entitled to her freedom. The fallacious doctrine of waiver does not fit the facts of this case. *Cf. Stroud v. United States,* Kan., 1919, 40 S. Ct. 50, 251 U. S. 15, 64 L. Ed. 103, and *Trono v. United States,* 199 U. S. 521, 26 S. Ct. 121, 50 L. Ed. 292. Even if there had been a consent by the petitioner, we submit that she could not have waived this provision of the organic law. *Kepner v. United States,* 195 U. S. 100, 49 L. Ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; *Ex Parte Lange,* 18 Wall. 163, 21 L. Ed. 872.

A federal question was raised at the outset of the trial below and was raised repeatedly throughout the trial. (See Transcript of Record at pages 53-54, folios 211-215.) The petitioner seeks review in this court on the grounds that she has been denied due process under the fourteenth amendment.

Under the doctrine announced in the *Trono case* (cited above), this petition presents a striking example of the manner in which the constitutional immunity from double jeopardy is being carved away so that only a slender reed remains to support this great principle of our jurisprudence. The facts in this case are clear and succinct.

In affirming the opinion of the Trial Court, the Supreme Court of South Carolina has violated the immunity guaranteed by the Constitution of the United States against being tried again for the same offense.

Respectfully submitted,

IDA E. STEADMAN,
Petitioner.

C. T. GRAYDON,
Attorney for the Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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FALL TERM, 1950

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IDA E. STEADMAN, PETITIONER,

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THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION BELOW

The sentence and judgment of the Honorable Trial Court is found at page 302 of the Transcript of Record (Folio 1206). The opinion of the Supreme Court of the State of South Carolina is to be found in 59 S. E. (2d) 168, while the first appeal is to be found in 214 S. C. 1, 51 S. E. (2d) 91. Certified copies of the decision below have been forwarded with the Transcript of Record.

GROUND OF JURISDICTION

This Honorable Court has jurisdiction of the case pursuant to Act of June 25, 1948, C. 646, 62 Stat. 929; Title 28, Sec. 1254, par. (3), United States Code.

STATEMENT OF THE CASE

A summary statement of the case has already been made in the petition filed with this brief under the heading, "A. SUMMARY STATEMENT OF THE MATTER INVOLVED," and leave to omit the same here is asked for the sake of brevity and economy.

ERROR TO BE URGED

The Supreme Court of the State of South Carolina erred in affirming the judgment of the Trial Court and in refusing to enter judgment for the petitioner on the ground that the petitioner had been thereby subjected to double jeopardy, she having already been found not guilty on the count on which she was tried at the second trial.

SUMMARY OF ARGUMENT

The petitioner contends that she has been placed in double jeopardy by being subjected to a second trial on a count on which she had already been acquitted—in violation of the personal immunities guaranteed her by the Constitution of the United States. Articles 5 and 14, Amendments to the Constitution of the United States.

The fact that the petitioner sought a reversal of the judgment in another suit in no wise amounted to a waiver of the rights which had accrued to the petitioner in regard to the count under consideration on this appeal. The Supreme Court of the State of South Carolina properly reversed the judgment on the first count; the case should

have been remanded for entry of judgment for the petitioner.

Thus the petitioner has been placed in double jeopardy. For the same offense she has been tried twice. We believe that the State Court has committed error in requiring the petitioner to be placed in jeopardy through this second trial in violation of the 14th amendment of the U. S. Constitution.

ARGUMENT

The single important question presented to the court by this appeal is a matter on which the courts of our nation have been divided for many years. Under the Fifth Amendment to the Constitution of the United States and familiar principles of the common law, no one shall be brought into danger of life or limb for the same offense more than once, and under the 14th Amendment no person can be deprived by the state of life, liberty or property without due process of law.

The application of these apparently simple constitutional provisions and common law principles has caused many divergent judicial viewpoints on its varied aspects. The test in the usual case which arises under the double jeopardy clause is not too difficult of solution.

In determining whether one has been in "jeopardy" under the Fifth Amendment the test is generally not whether defendant has been tried once before for the same act, but whether he has been in jeopardy for the same offense. *United States v. One Buick Coach Automobile,* D. C. Ind., 34 F. (2d) 318. It is only when the same matter is in issue in both cases that the defendant can be said to be put in jeopardy for the same offense in both cases. A trial jury is not expected to base its opinion of the weight of the evidence upon the opinion of other men, and is not to be in-

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fluenced by the consideration of what any other jury has or might have done upon the same state of facts. *Koenigstein v. State,* 162 N. W. 879, 882, 101 Neb. 229.

This double jeopardy provision in the Constitution was considered in some detail in the case of *Ball v. United States,* 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300. In this case, the defendant Ball was acquitted of the crime of murder upon an indictment which was fatally defective; two other defendants were convicted under this defective indictment. Upon an appeal by the latter defendants, the case was remanded for a new trial at which all three defendants were convicted. Ball entered a plea of former jeopardy, and the court, in sustaining the plea, said:

> "The Constitution of the United States, in the 5th Amendment declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com. v. Peters,* 12 Met. 387; 2 Hawk. P. C. chap. 35, § 3; Bishop, Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by writ of habeas corpus. *Ex parte Parks,* 93 U. S. 18 (23: 787). If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States v. Sanges,* 144 U. S. 310 (36: 446). But

the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case."

The principles generally relied on are reviewed in 15 American Jurisprudence at page 38 (Criminal Law No. 359) as follows:

> "It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by elementary writers and courts of judicature from a very early period down to the present time, 'That a man shall not be brought into danger of his life or limb for one and the same offense more than once.' It has been said that the test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. The rule not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not or in the former trial has been acquitted or convicted."

This well-established principle was incorporated into the Bill of Rights and thus became a part of our national fundamental law—similar provisions are contained in most state constitutions—including South Carolina. The subsidiary question as to whether the federal constitution can be invoked when a person has been placed in double jeopardy is one which should be answered in the affirmative.

The South Carolina Court has taken the position that this amendment of the United States Constitution (Article V) does not apply to offenses and trials under the law of South Carolina. *State v. Shirer,* 1883, 20 S. C. 382, *State v. Bilton,* 1930, 156 S. C. 324, 153 S. E. 269. Actually the wording of the provision in the federal constitution is the same except for one word. The United States Constitutional

provision reads as follows: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The state provision substitutes the word "liberty" for "limb".

But we take the position that the federal constitution provision does apply, and further that this Honorable Court has the right and the duty, when properly petitioned, to ascertain whether or not the personal privileges and rights guaranteed by the United States Constitution have been maintained.

The Fourteenth Amendment prohibits the deprivation of life, liberty or property without due process of law. This amendment has been interpreted to refer to state action only, and that is what is involved here. 16 Corpus Juris Secundum, p. 131 (Constitutional Law No. 69.) The United States has a duty under this amendment to see that citizens are not denied the fundamental rights which belong to every citizen as a member of society. *U. S. v. Harris,* Tenn. 1 S. Ct. 601, 106 U. S. 629, 27 L. Ed. 290.

The United States Supreme Court, under the Fourteenth Amendment, has upset so-called state action in cases involving confessions obtained under duress. *Watts v. Indiana,* 338 U. S. 49, 93 L. Ed. 1801; *Harris v. South Carolina,* 338 U. S. 68, 93 L. Ed. 1815. This court has also interfered with state courts under the broad terms of this amendment when the aid of counsel was denied the accused. *Brown v. Mississippi,* 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682. So also this court has recognized the right of the accused to be present in court. *Snyder v. Massachusetts,* 54 S. Ct. 330, 291 U. S. 97, 78 L. Ed. 674.

Thus the principle of the common law that no person shall be subject for the same offense to be twice put in jeopardy, recognized by the Fifth Amendment as a restriction

upon the federal government, is also within the Fourteenth Amendment as an inhibition on the states. This principle has been discussed in *Palko v. Connecticut,* 58 S. Ct. 149, 302 U. S. 319, 82 L. Ed. 288, adversely to the position of this petitioner, but we submit that the tendency of this court to extend the immunities and privileges of the constitution should now include the double jeopardy provision under the Fourteenth Amendment.

That the petitioner was tried twice for the same offense is apparent from the record. (R., pp. 42-56.) But to this principle there are well-taken exceptions. Thus the principle is well established that a person convicted for a crime waives his constitution and common-law protection against being put twice in jeopardy where a conviction is reversed on appeal or error proceedings instituted by him. 15 American Jurisprudence, pp. 89-91. (Criminal Law No. 427.)

But what of other counts on which there has been an acquittal either express or implied? That is the question on this appeal.

The rule on this question as stated in 22 Corpus Juris Secundum at page 409 (Criminal Law 272 (c)) is as follows:

"By the weight of authority, an acquittal upon one of several counts in an indictment, without a finding on the others, is an entire discharge of accused, and may be pleaded in bar of a subsequent trial on the other counts, and where accused has been found guilty on one of several counts, and the verdict is silent as to the others, and he obtains a new trial, he can be prosecuted only for the crime of which he was found guilty, and may plead a prior acquittal as to the other counts. There are, however, cases to the contrary."

The question, as to a conviction for a lesser charge only preventing a subsequent trial on the higher charge, has caused considerable diversity of opinion among the courts. In 22 Corpus Juris Secundum, at page 409 (Criminal Law No. 272 (d)), the author summarizes the authorities as follows:

"In the absence of statute, it has been held generally that, on a new trial being granted an accused, he cannot be tried again for a higher grade of the same offense of which he was convicted on the first trial; but some courts have held exactly the contrary, and that upon a new trial the whole case is open as if there had been no former trial. In some jurisdictions the question is settled by constitutional or statutory provisions which specify that the granting of a new trial places accused in the same position as if no trial had been had."

Further in the same authority, we find:

"In the absence of such constitutional or statutory provision, where one who has been indicted for murder and convicted of homicide of a lesser degree moves for and obtains a new trial, the authorities are not in harmony as to whether he can be placed on trial again for the greater or only for the lesser offense, under the general prohibition contained in state constitutions against putting a person twice in jeopardy for the same offense. The greater number of authorities take the view that a verdict of guilty of the lesser crime involves an acquittal of the greater, and that a new trial, granted on motion of accused after conviction of the lesser offense, is not to be considered as a new trial for the greater offense of which he was acquitted, but must be confined to a retrial of the offense of which he was convicted, as accused should not be deemed to have waived his right in so far as he was acquitted."

The divergent rules on this question are summarized as follows in 15 American Jurisprudence at pages 91-92 (criminal law No. 428):

"A question that has given rise to two well-defined rules is whether a conviction of a lower degree of a crime is a complete acquittal of the higher degrees in the sense of the rule against putting twice in jeopardy, so that if a new trial is granted by motion or on appeal, it must be limited to the lower degree of which the defendant was previously convicted. One line of authorities answers this question in the negative and holds that on the new trial the defendant may be tried again for the crime as charged in the indictment and that he may be convicted of any degree of such crime just as if there had been no previous trial. The reasons given for this rule are that the defendant cannot voluntarily set aside the verdict and also hold to it. A verdict cannot at the same time be of force and not of force. The verdict of guilty is single. The defendant cannot divide it into that which pleases him and that which does not. The positive fact is the verdict of guilty of one offense, and the negative implication from that finding is not guilty of the other offense. It is not easy to see how the positive finding which furnishes the sole basis for the negative implication can be destroyed and set aside by the voluntary action of the accused, and yet leave the implication to stand alone without a basis. To sustain a plea of former acquittal, there must be a subsisting record of an acquittal of the greater, when it is set aside at the instance of the accused, it is certainly no longer a subsisting record of conviction. The courts holding this view do not agree that the defendant has the right to limit his waiver as to jeopardy when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in

the indictment or for any lesser degree thereof. No power can wrest from him the right so to use that judgment; but if he chooses to appeal from it and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed. The other rule is that a verdict of conviction of a lesser degree of a crime charged involves a complete acquittal of the higher degrees for all purposes and that a new trial subsequently granted on motion of the defendant is not to be considered as a new trial for the greater offense of which he was acquitted, but must be confined to a retrial of the offense of which he was convicted. The theory of this is that the result of the verdict is the same as though the defendant had been tried on separate indictments charging the several crimes or on an indictment containing counts separately charging the offenses. The real difference between the two rules is the extent of the waiver which the defendant makes by asking for and receiving a new trial."

The majority rule in this country on this question is expressed in a complete annotation found in 80 A. L. R. at page 1106 as follows:

> "Conceding that a defendant charged with two or more offenses under two or more counts, who by an appeal or error seeks a review of his conviction under one of the counts, cannot plead former jeopardy as to such count so as to prevent his being tried again on such count, the question whether, after the reversal of the conviction on such count and upon a new trial granted in pursuance of such reversal, he can be retried on the count or counts as to which there was in the former trial an acquittal, express or implied, is one which is answered in the negative by most courts."

The annotator then cites the following cases as supporting this view: *Bell v. State,* 1872, 48 Ala. 684, 17 Am.

Rep. 40; *May v. State,* 1876, 55 Ala. 164; *Green v. State,* 1880, 17 Fla. 669; *Stoltz v. People,* 1843, 5 Ill. 168; *Logg v. People,* 1881, 8 Ill. App. 99; *Weinzor Pflin v. State,* 1844 (Ind.) 7 Blackf. 186; *Brown v. United States,* 1899, 2 Ind. Terr. 582, 52 S. W. 56; *State v. Severson,* 1890, 79 Iowa 750, 45 N. W. 305; *State v. Malling,* 1860, 11 Iowa 239; *State v. McNaught,* 1887, 36 Kan. 624, 14 Pac. 277; *Morris v. State,* 1847 (Miss.), 8 Smedes 6 M. 762; *State v. Kattlemann,* 1864, 35 Mo. 105; *State v. Gannon,* 1882, 11 Mo. App. 502; *State v. Casey,* 1907, 207 Mo. 1, 123 Am. St. Rep. 367, 105 S. W. 645, 13 Ann. Cas. 878; *State v. Hall,* 1910, 141 Mo. App. 701; 125 S. W. 229; *State v. Polk,* 1910, 144 Mo. App. 326, 127 S. W. 933; *George v. Stak,* 1899, 59 Neb. 163, 80 N. W. 486; *Guenther v. People,* 1861, 24 N. Y. 100; *People v. Dowling,* 1881, 84 N. Y. 478; *People ex rel. Sabatina v. Jennings,* 1919, 108 Misc. 93; 37 N. Y. Crim. Rep. 550, 177 N. Y. Supp. 210 (affirmed in 1920, 194 App. Div. 950, 185 N. Y. Supp. 949); *Campbell v. State,* 1836 (Tenn.) 9 Yerg. 333, 30 Am. Dec. 417; *Esmon v. State,* 1851 (Tenn.) 1 Swan 14; *State v. Abernathy,* 1926, 153 Tenn. 441, 284 S. W. 361; *Betts v. State,* 1911, 60 Tex. Crim. Rep. 631, 133 S. W. 251; *Martin v. State,* 1916, 80 Tex. Crim. Rep. 275, 189 S. W. 262; *Young v. State,* 1931 (Texas) 35 S. W. (2d) 424; *Lithgow v. Com.,* 1822, 2 Va. Cas. 297; *Stewart v. Com.,* 1877 (Va.) 28 Gratt. 950; *State v. Owens,* 1930, 157 Wash. 54, 288 Pac. 233; *State v. Hill,* 1872, 30 Wis. 416; *State v. Betts,* 1921, 173 Wis. 608; 182 N. W. 474.

The majority view rejects the theory of waiver and maintains that a defendant seeks to reverse only so much of the verdict as supports the conviction, thereby reserving advantages which have already accrued to him. The rule is stated in *State v. Martin,* 1872, 30 Wis. 216, 11 Am. Rep. 567, quoting Mr. Bishop in his work on Criminal Law as follows:

"The waiving of a constitutional right, implied in the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict finds the prisoner guilty of a part of the charge against him, and not guilty of another part, as, for example, guilty on one count of the indictment and not guilty on another count, or, there being one count, guilty of manslaughter and not guilty of murder, and a new trial is granted him, he cannot be convicted on the second trial of the matter of which he was acquitted on the first."

That a party can waive the rights and immunities guaranteed by the constitution is well established. *State v. Faile,* 1894, 43 S. C. 52, 20 S. E. 798. But the provisions must be expressly waived—not by implication or silence. Here the petitioner waived nothing by her appeal to a higher court.

The majority of the Supreme Court of the State of South Carolina in the case at bar concluded that the reversal of the judgment in the case of *State v. Steadman,* 214 S. E. 1, 51 S. E. (2d) 91, and the retrial of the case constituted a waiver on the part of the defendant of an implied acquittal on the count on which she has, on a second trial, been convicted and sentenced (Section 1113 S. C. Code 1942). Supporting this position the Court cited: *State v. Gillis,* 73 S. C. 318, 53 S. E. 487; *State v. McGhee,* 55 S. C. 247, 33 S. E. 353; *State v. Hamilton,* 80 S. C. 435, 61 S. E. 965, and *State v. Steadman,* 214 S. C. 1, 51 S. E. (2d) 91.

That a verdict of guilty on one count implies a verdict of not guilty on other counts is a principle affirmed by the South Carolina Court. *State v. McGhee,* 1898, 55 S. C. 247, 33 S. E. 353. But what of this count when there has been a

reversal of another count? The South Carolina courts have adopted the theory that the reversal of a case calls for a trial *de novo—i. e.* "as if no trial had been had." *State v. Commissioners,* 3 Hill (21 S. C. Law) 239, *State v. Gillis,* 1905, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (ns) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993. In the *Gillis case* the defendant, convicted of manslaughter at the first trial, sought to establish former jeopardy when he was tried again on a murder charge. The court refused to sustain the plea.

The South Carolina case of *State v. Hamilton,* 1908, 80 S. C. 435, 61 S. E. 965, 128 Am. St. Rep. 881, involved the question of former jeopardy. The defendant was indicted on two counts, burglary and larceny. At the conclusion of the testimony in the first trial, the Solicitor entered a *nulle prosequi* as to the burglary charge. The defendant was found guilty on the larceny charge and, upon appeal, was granted a new trial.

The Court in refusing to uphold the defendant's plea of former jeopardy, said:

> "Thus the defendant is responsible for all consequences which will flow to him from the new trial. If he had remained quiet, unquestionably his plea of former jeopardy would have been sustained. The effect, however, of the order for a new trial has removed every vestige of his plea of former acquittal."

No case from South Carolina on this question has ever been reviewed by the Honorable Court to which this petition is addressed. But the authorities have been reviewed in other cases.

The leading case of this court is *Trono v. United States,* 199 U. S. 521, 50 L. Ed. 292, 26 S. Ct. 121, in which it was held that an accused, found guilty of a lesser offense from which judgment he appealed, could upon a reversal

be tried again for the greater offense as well as for the offense on which there had been a conviction.

The Court pointed out the diversity of opinion in this country on this question, but there is still no authoritative opinion settling this United States Constitutional question in regard to cases tried in State courts. That we submit, is a proper matter for review by this court at this time.

In the *Trono case,* three defendants were retried on the murder charges after having been found not guilty on that count and guilty of assault only in the original proceeding. Three judges dissented from the opinion on the grounds that the men were thereby placed in double jeopardy.

As Mr. Justice Harlin (dissenting) remarked: "* * * the accused in the present case were entitled to the benefit of the jeopardy clause of the Constitution, and that, after their acquittal in the tribunal."

The decision in the *Trono case* was reaffirmed by the United States Supreme Court in *Flemister v. United States,* 207 U. S. 372, 28 S. Ct. 129, 52 L. Ed. 252, an opinion written by Mr. Justice Holmes in 1907.

This rule in effect whittles away the plain meaning of the Constitution. This case presents a clear and powerful example of that process which should be halted before only a slender reed is left. The immunity is a precious one in our history, and the most severe technicalities should be preserved in order that the rule will remain as originally intended.

The most recent United States Supreme Court decision restricting further the double jeopardy provision of the Constitution is *Wade v. Hunter,* 1949, 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974. After some evidence on both

sides had been presented, a prior court martial was dissolved because of the advancing military situation. The court said that the dissolution of the court martial was within the sound discretion of the tribunal and that there was therefore no double jeopardy.

Two justices joined Mr. Justice Murphy's dissent in which he declared that "The guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions."

In *Bryan v. United States,* 1949, 5 C. C. A., 175 F. (2d) 223, the accused was granted a new trial after being convicted on two counts in an income tax evasion case on the grounds that the evidence was insufficient to support the conviction. Bryan was acquitted on charges for two other years by the jury. The circuit court of appeals properly upheld the rule that "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."

But the Court—and also very properly—held that there could be no further prosecution under the two counts on which there had been an acquittal. That is the principle on which we are relying here. The petitioner is not relying on a mere technicality, but upon her rights under the Constitution.

In conclusion, we submit that the petitioner has been deprived of her rights under the Constitutions of the State and the United States; two of the justices of the South Carolina Supreme Court—including the distinguished Chief Justice of that Court—reached this same conclusion. On that basis we submit this petition for a writ of *certiorari.*

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